No. 89-634

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
*Petitioner,*

v.

BANNER INDUSTRIES, INC.,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court and the court of appeals correctly determined, on the specific facts of this case, that the parties could proceed to arbitration after a threshold and novel issue of arbitrability was timely raised and resolved by the district court.

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 875 F.2d 1285 and is reproduced as Appendix C to the petition. The opinion of the United States District Court for the Northern District of Illinois is reported at 657 F. Supp. 875 and is reproduced as Appendix D to the petition.

### JURISDICTION

The district court's jurisdiction was invoked under 29 U.S.C. § 1451 (1982). Petitioner's statement that "[t]he jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291" is incorrect. (Pet. 1.) Rather, the jurisdiction of the court of appeals was invoked by certification under 28 U.S.C. § 1292(b).

The judgment of the court of appeals affirming the district court was entered on May 23, 1989 and is reproduced as Appendix B to the petition. Its order denying petitioner's application for rehearing with suggestion for rehearing en banc was entered on July 20, 1989 and is reproduced as Appendix A to the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### 1. *The Parties*

Banner Industries, Inc. is an Ohio-based corporation [1] and was until 1983 the parent corporation of Commercial Lovelace Motor Freight, Inc., which previously made pension fund contributions to Central States.

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer pension plan within the meaning of ERISA, 29 U.S.C. § 1002(2)(A), (35), and (37).

### 2. *The Statute*

Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.* was amended by the Multiemployer Pension Plan Amendments Act of 1980 and codified in relevant part at 29 U.S.C. §§ 1381-1451. Under MPPAA, an "employer" that withdraws from a multiemployer pension plan is liable to the plan for its share of the plan's unfunded vested benefit liability. The employer's share is called its "withdrawal liability." 29 U.S.C. § 1381.

### 3. *The Proceedings Below*

The withdrawal liability assessment issued by Central States against Banner was triggered by the bankruptcy of Commercial in 1985. Commercial, a wholly-owned subsidiary of Banner from 1969 through March 1983, was an ICC-chartered trucking company that negotiated a collective bargaining agreement with the International

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[1] Banner has no parent corporation, and each of its subsidiaries is wholly owned. Accordingly, Rule 28.1 of this Court does not apply.

Brotherhood of Teamsters. That bargaining agreement required Commercial to "contribute" to the Central States pension plan on behalf of the Teamsters employees of Commercial. Banner was never a party to any of Commercial's agreements with the IBT, and never made any contributions to Central States on behalf of Commercial.

In 1983, after Commercial had experienced difficulty in operations, its employees agreed to a wage cut of approximately 20 percent in exchange for Banner's transfer of a majority of its shares in Commercial to an Employee Stock Ownership Plan. (Pet. App. C 6a-7a.) This transfer of stock resulted in Banner no longer being a member of a "control group" with Commercial. 29 U.S.C. § 1301. Under MPPAA, all members of a control group are viewed as "employers" and are jointly and severally liable for the withdrawal liability of any member in the group.

Some two years after the ESOP, Commercial filed for bankruptcy and ceased operations in November 1985. This, in turn, resulted in a "withdrawal" since Commercial ceased to make any contributions to Central States. On March 25, 1986, Central States sent a notice and demand for payment of Commercial's withdrawal liability to Banner, which the Fund determined was still an "employer" (or a member of Commercial's control group), notwithstanding Banner's transfer of Commercial stock to the ESOP more than three years earlier.

Within thirty-six days of the assessment, Banner filed suit in the Northern District of Illinois seeking a declaratory judgment that it was neither liable for Commercial's withdrawal liability nor subject to MPPAA's arbitration and interim payment provisions because Banner had ceased to be an "employer" at the time of the ESOP.[2] On March 25, 1987, the district court ruled that since

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[2] Under MPPAA, "employers" are required to arbitrate certain disputes with a fund. 29 U.S.C. § 1401. In addition, "employers" must make "interim payments" to the fund while they contest an assessment. 29 U.S.C. § 1399.

Banner had once been an "employer" for MPPAA purposes, its status at the time of Commercial's withdrawal was an issue to be resolved by an arbitrator.

In ordering the parties to pursue arbitration, the district court rejected Central States' argument that Banner had "waived" its right to arbitrate by first seeking resolution of the issue of the arbitrator's jurisdiction in court. Indeed, the district court found that the arbitrability issue raised by Banner "must be decided by a court" and that to resolve such jurisdictional disputes, a court must be able to "toll" MPPAA's time periods "until a determination is made" that arbitration is not only "proper" but *"possible."* (Pet. App. D 37a, 42a, emphasis in original.) The district court also held that Banner's "immediate and affirmative" action in filing the suit, along with the difficulty of the jurisdictional question which was "not clearly addressed by the statutory provisions" and had "not been previously definitively decided," supported tolling the time periods specified in the statute. (Pet. App. D 40a-42a.) Finally, the district court explained that its decision could not "produce the dire results Central States predicts" because not "every arguable issue of statutory interpretation" would qualify for tolling. (Pet. App. D 41a.)

Upon cross-motions by the parties, the district court certified both its arbitrability and tolling rulings for interlocutory review under 28 U.S.C. § 1292(b), and the court of appeals granted discretionary review of the issues. On May 23, 1989, a unanimous panel of the court of appeals affirmed the district court on both issues. The panel agreed that Banner's status as a former employer subjected it to MPPAA's arbitration provisions.[3] The

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[3] The panel based its affirmance largely on an intervening decision by the Third Circuit, *Flying Tiger Line, Inc.* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987). *Flying Tiger* raised a similar "employer" issue which was also certified for interlocutory review. Significantly, the district court in *Flying Tiger* also tolled the period for initiating arbitration, but that tolling decision was not appealed by Central States. *Flying Tiger Line,*

panel also upheld the district court's tolling decision, explaining that "the deadline for arbitration" should be tolled "until a determination is made that the party is subject to mandatory arbitration." (Pet. App. C 16a.) Moreover, like the district court, the court of appeals expressly limited the scope of its ruling: "Not every imaginable question of statutory construction will toll the period during which arbitration must begin" and "certainly the next similarly-situated employer who litigates rather than arbitrates will do so in the face of our opinion here." (Pet. App. C 21a.)

Central States sought rehearing en banc of the unanimous panel decision. In addition, the Pension Benefit Guaranty Corporation submitted an *amicus* brief in support of Central States' rehearing petition.[4] In their rehearing briefs, both Central States and the PBGC made arguments identical to those made in the present petition. On July 20, 1989, rehearing en banc was denied by an order noting that "no judge in active service ha[d] requested a vote" on the petition. (Pet. App. A 2a.)

While Central States has pursued its interlocutory appeal on the tolling issue, two significant developments occurred that place the petition in context. *First*, after the district court certified its tolling issue, it ordered Banner not only to make interim payments of $450,000 a month, but to make a lump-sum payment of $4.5 million representing the amount of interim payments that accrued while the district court was resolving the threshold arbitrability issue. *Banner Industries, Inc.* v. *Central States*

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*Inc.* v. *Central States Pension Fund*, 659 F. Supp. 13, 18-19 (D. Del. 1986).

[4] Before the panel, the PBGC had submitted a brief supporting petitioner's position on the arbitrability issue but had expressly disavowed any position on the tolling issue. Likewise, while the PBGC had expressed its position on the arbitrability issue before the district court, it never commented on the issue of whether tolling was appropriate in this case. It was only after the panel's decision that the agency, for the first time, opposed tolling in this case.

*Pension Fund*, 663 F. Supp. 1292 (N.D. Ill. 1987). In addition, the district court ordered Banner to pay Central States interest on those accrued payments, as well as liquidated damages and attorneys fees, under 29 U.S.C. § 1132(g). *Id.* at 1300. *Second*, immediately after the district court resolved the arbitrability issue, Banner proceeded directly to arbitration. The parties have therefore engaged in arbitration for two and a half years, which has included a two-week hearing on whether Banner is liable for Commercial's withdrawal. (That issue was resolved in Central States' favor.) The parties are now preparing for a separate hearing on the amount of the assessment.

In the midst of these proceedings, Central States seeks certiorari in this Court of a fact-bound issue on which no judge below has expressed a contrary opinion.

## REASONS FOR DENYING THE WRIT

The tolling decision Central States wishes this Court to review poses two simple issues: first, whether the district court had the *power* to toll the time period for initiating arbitration under MPPAA; and second, whether it was *appropriate* to toll that time period under the particular facts of this case.

As to the first issue, there is universal agreement that the time periods of MPPAA are *not* jurisdictional and thus courts may toll those provisions in appropriate circumstances. As shown in Part I below, seven courts of appeals have so held, no court has held to the contrary, and the two cases petitioner claims "conflict" with the decision below do not even address the question of tolling but only determine that relief from MPPAA's time periods was not warranted under the specific, and notably different, facts of those cases. The factual issue of whether tolling was *appropriate* in this case does not warrant a third examination, especially by this Court.

Part II below shows that the flat ban on tolling urged by Central States would effectively render the time

periods of MPPAA jurisdictional, and would seriously impair the settled responsibility of courts, not arbitrators, to decide threshold issues of arbitrability. Moreover, contrary to petitioner's exaggerated claims that the decision below will "invit[e]" parties to "ignore" arbitration (Pet. 13), experience under MPPAA shows that courts have had no difficulty in determining where resort to the courts is not justified. The court of appeals' express warning to future litigants not to rely on the same arbitrability issue raised in this case further ensures that tolling will continue to be sparingly applied. Accordingly, any rule that strips all discretion from lower courts to decide threshold issues of arbitrability would be both unworkable and unnecessary.

## I. Since MPPAA's Time Periods Are Not Jurisdictional, The Fact-Bound Decision Below Presents No Issue Worthy Of Review.

The sole "legal question" raised by Central States' petition is whether MPPAA's review provisions may be tolled under any circumstances. Central States asserts these provisions are "absolute" and cannot be tolled. (Pet. 8.) Equitable tolling is barred, however, only where exhaustion of non-judicial remedies is a "jurisdictional" prerequisite. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

*Every* court of appeals in the seven circuits that have addressed the issue has held that MPPAA's arbitration requirement is *not* jurisdictional.[5] That MPPAA's time

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[5] *See, e.g., Rootberg* v. *Central States Pension Fund*, 856 F.2d 796, 800 (7th Cir. 1988); *Robbins* v. *Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States Pension Fund* v. *T.I.M.E.-DC, Inc.*, 826 F.2d 320, 325-28 (5th Cir. 1987); *Grand Union Co.* v. *Food Employers Labor Relations Ass'n*, 808 F.2d 66, 69 (D.C. Cir. 1987); *Central States Pension Fund* v. *888 Corp.*, 813 F.2d 760, 764 (6th Cir. 1987); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628, 634 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502, 1508-09 (9th Cir. 1983), *rev'd on other grounds sub nom. PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984);

periods *can* be tolled is separately confirmed by a long-standing PBGC regulation, which expressly provides that the "parties may . . . by mutual agreement *at any time*, waive or extend the time limits specified." 29 C.F.R. § 2641.2(b) (1988) (emphasis supplied). If private parties may simply "agree" to extend MPPAA's deadlines notwithstanding the important congressional policies behind the Act, federal courts faced with threshold issues consigned to their exclusive jurisdiction plainly have that power. Finally, several courts have expressly applied the doctrine of equitable tolling to MPPAA,[6] while no court has found tolling inimical to the terms or policies of MPPAA.[7]

Against this backdrop of settled law, petitioner claims that the decision below conflicts with *I.A.M. Nat'l Pension Fund* v. *Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987). (Pet. 7-8.) Petitioner also argues that *IUE AFL-CIO Pension Fund* v. *Barker & Williamson, Inc.*, 788

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*Republic Industries, Inc.* v. *Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982).

[6] *See Trustees of the Chicago Truck Drivers Pension Fund* v. *Central Transport, Inc.*, Nos. 88-2604, 88-2836 (7th Cir. Oct. 31, 1989) (Supp. Pet. App.); *Republic Industries* v. *Teamsters*, 718 F.2d at 644; *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986); *Flying Tiger Line, Inc.* v. *Central States Pension Fund*, 659 F. Supp. 13, 19 (D. Del. 1986); *aff'd sub nom. Flying Tiger Line, Inc.* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987); *Terson Co.* v. *PBGC*, 565 F. Supp. 203 (N.D. Ill. 1982).

[7] Several courts have denied tolling based on the particular circumstances of a case, while still recognizing the availability of tolling. *See, e.g., Combs* v. *Harold*, No. 84-1789, slip op. at 3 (D.D.C. Feb. 19, 1986) ("defendant has taken no action which would toll the statutory time frame for requesting review or arbitration") (available on WESTLAW); *Centennial State Carpenters Pension Trust Fund* v. *Woodworkers of Denver, Inc.*, 615 F. Supp. 1063, 1068 (D. Colo. 1985) ("defendant did not file a district court action within the limitation periods in Section 1401 and thereby failed to toll the statute of limitations") (emphasis supplied); *Combs* v. *Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 127 (D.D.C. 1984) ("defendants have taken no action which would toll the statutory time frames").

F.2d 118 (3d Cir. 1986), suggests that the decision below somehow flouts an "express congressional mandate." (Pet. 9.) The short answer is that if Congress, in order to promote the policies of MPPAA, had wanted to stop courts from ever tolling its time periods, it would have made MPPAA's time periods "jurisdictional." Having not done so, in the view of seven circuits (including the District of Columbia Circuit and the Third Circuit),[8] no conflict exists on the legal issue of whether tolling *can* be applied to MPPAA.[9]

In any event, *Clinton Engines* is easily distinguished from this case. To begin with, in *Clinton Engines* the employer *admitted* that an arbitrator *had jurisdiction* to decide its challenge to the fund's assessment but nonetheless bypassed arbitration on the ground that arbitration would be "futile and unnecessary." *Clinton Engines*, 825 F.2d at 420-21, 424, 427-28. This is in sharp contrast to the employer here promptly raising a threshold challenge to the arbitrator's jurisdiction that was expressly determined by both courts below to be an issue of first impression. (Pet. App. D 42a.)

In addition, the employers in *Clinton Engines* waited for the fund to bring a collection action before raising

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[8] Indeed, *Clinton Engines* expressly stated "we [have] held, *as have all other circuit courts that have considered the issue*, that section 1401(a) of MPPAA was not an 'absolute jurisdictional bar,' but instead constituted an 'exhaustion of administrative remedies' requirement." 825 F.2d at 417 (citation omitted) (emphasis supplied).

[9] On the contrary, this case closely parallels the Fourth Circuit's decision in *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Like Banner, the *Republic Industries* employer promptly initiated suit in federal court rather than pursuing arbitration in the first instance; like Banner, the employer raised questions that had not been previously resolved and that were beyond the purview of an arbitrator's jurisdiction; and like Banner, the employer in *Republic Industries* although losing its threshold challenge was found not to have "waived" its right to contest the assessment as to issues that were arbitrable. *Id.* at 635, 644.

any defenses, which the district court itself distinguished from this case (Pet. App. D 40a):

> This is not a case in which the party assessed did absolutely nothing, waited until the pension plan filed a collection action against it, and then for the first time tried to assert its defenses in court when it should have proceeded in arbitration. Banner took immediate and affirmative steps to contest its liability.

Several other "waiver" cases recognize the steps taken by the employer in this case as fundamentally different from those compelling the harsh forfeiture petitioner seeks here, and many of those decisions expressly acknowledge that tolling *is appropriate* under the circumstances present here.[10]

Petitioner's reliance on *Barker & Williamson* is equally misplaced. Like *Clinton Engines*, it does not even mention tolling, and like *Clinton Engines*, the employer raised its defenses only in response to a collection action. Moreover, *Barker & Williamson* actually endorsed the action taken below, explaining that an employer, rather than waiting for a collection action to be brought, could instead "bring a declaratory judgment action" in order to have its employer status "resolved by a federal court." *Barker & Williamson*, 788 F.2d at 129.[11]

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[10] *See, e.g., Central States Pension Fund* v. *MGS Transp. Inc.*, 661 F. Supp. 54, 57 (N.D. Ill. 1987) (the employer "could have preserved these objections for judicial review either by initiating arbitration according to Section 1401 *or by seeking a declaratory judgment*") (emphasis supplied); *Canario* v. *Byrnes Express & Trucking Co.*, 644 F. Supp. 744, 749 (E.D.N.Y. 1986) ("Express did nothing. It did not seek an informal review, request arbitration, *or commence an action in this* Court.") (emphasis supplied) (case later settled at 652 F. Supp. 385 (E.D.N.Y. 1987)); *Centennial State Carpenters*, 615 F. Supp. at 1068 (*"defendant did not file a district court action within the limitation periods* in Section 1401 and thereby failed to toll the statute of limitations") (emphasis supplied).

[11] *See also Rootberg*, 856 F.2d at 800 (holding "[t]here is no question that the MPPAA," under 29 U.S.C. § 1451, "authorizes

In short, neither *Clinton Engines* nor *Barker & Williamson* hold, in any way, that MPPAA's time periods are jurisdictional or are exempt from tolling. In fact, the court in *Clinton Engines* even noted that it had previously held "*under the particular circumstances*" of another case that an "employer's failure to arbitrate *did not* prevent it from raising its defenses in the context of a collection action." 825 F.2d at 417 (emphasis supplied). Since that earlier D.C. Circuit decision does not "conflict" with *Clinton Engines*, neither can this one. Petitioner's claim that MPPAA's time periods cannot be tolled (unless the parties simply agree to do so) is thus without legal support.

Since a court's *power* to toll MPPAA's time limits is not in dispute, the only remaining issue is whether it was *appropriate* to toll those limits under the particular facts of this case. But this Court will not "review evidence and discuss specific facts," particularly where the petitioner simply wants another hearing on matters peculiar to a single controversy. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Magnum Import Co.* v. *Coty*, 262 U.S. 159 (1923). This rule applies with particular force when a court of appeals concurs in the findings of a district court.[12] Accordingly, the "two-court" rule militates against further review of the ample facts that sup-

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[a] suit for declaratory judgment" in federal court). *Barker* even equated a party going to arbitration with "admit[ing] its status as a member of the control[] group." *Barker & Williamson*, 788 F.2d at 129. Given Banner's well-grounded belief it was not a member of a control group with Commercial, initiating arbitration was not a rational option.

[12] *E.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950); *Wupperman* v. *The Carib Prince*, 170 U.S. 655, 658 (1898). Indeed, this rule against further review of facts found by the district court and upheld by the court of appeals is so "well-settled" that it has been known for many years as the "two-court" rule. R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 303 at 608-10 (1936).

port tolling in *this* case, regardless of how unhappy petitioner may be with the particular result.[13]

If anything, the particular circumstances of this case strongly weigh against certiorari. Both courts below expressly disavowed this case as having any broad application. Nor can petitioner claim prejudice since it has to date collected approximately $17 million in "interim payments" from Banner, while engaging in arbitration with Banner for over two years. Finally, the ongoing arbitration necessarily means that there is yet no final judgment in this case, and denial of certiorari would be appropriate for this reason alone.[14] In sum, the petition seeks to short-circuit the very arbitration process petitioner claims is so vital to MPPAA, so as to bar the merits from being heard in *any* forum.

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[13] In stark contrast to petitioner's colorful charges that Banner "flouted" and "openly defied" arbitration (Pet. 12-13), the district court characterized the issue raised by Banner as a "difficult one" that was "not clearly addressed by MPPAA," and specifically found that "Banner cannot be said to have rested on its rights;" that Banner "filed its complaint in this court . . . well before the period for initiating arbitration had run;" that "Banner took immediate and affirmative steps to contest its liability;" and that "Banner's position [was not] a frivolous one or one taken in bad faith." (Pet. App. D 40a, 42a.) The court of appeals echoed these findings. (Pet. App. C 20a-21a.) And Banner's immediate resort to arbitration after the jurisdictional issue was decided further undercuts petitioner's claims that MPPAA's arbitration scheme has been subverted in this case.

[14] Since a district court's certification of an interlocutory ruling is not binding on a court of appeals, it certainly is not binding on this Court. And while this Court can, of course, review interlocutory rulings, it has been loath to do so since "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co.* v. *Jacksonville, T. & K. W. Railway*, 148 U.S. 372, 384 (1893). Indeed, that the decision below is not a final disposition of the controversy between the parties "of itself alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

## II. The Result Sought By Petitioners Would Conflict With The Settled Rule That Courts, Not Arbitrators, Must Decide Threshold Issues Of Arbitrability.

This case involves more than a party who promptly and in good faith brings a case in the "wrong forum," as in a typical equitable tolling decision.[15] Banner was *required* to raise in federal court the issue of whether the arbitrator had jurisdiction over this dispute: "Any factual disputes material to a determination whether the arbitrator has power to adjudicate a matter must be decided by a court." (Pet. App. D 37a.)[16] Arbitrators likewise have noted that they cannot decide jurisdictional issues.[17]

Yet, if a party risks waiving its statutory right to arbitration by promptly raising a threshold issue of arbitrability in a federal court, it is placed on the horns of an intolerable dilemma.[18] Faced with this prospect,

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[15] *See, e.g., Burnett* v. *New York Central Railroad*, 380 U.S. 424, 428 (1965).

[16] *See also AT & T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 651, 643 (1986) ("It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration."); *Local 106* v. *Homewood Memorial Gardens, Inc.*, 838 F.2d 958, 961 (7th Cir. 1988) ("[i]t is illogical to require an arbitrator, and not a court, to determine the arbitrator's authority to act"); *Mason & Dixon Tank Lines, Inc.* v. *Central States Pension Fund*, 852 F.2d 156, 167 (6th Cir. 1988) ("a company [may] bypass arbitration for the *limited purpose* of determining whether it is an 'employer' within the meaning of section 1401(a)(1)"; after employer issue is resolved, arbitration of other issues may be required) (emphasis supplied).

[17] *See Ells* and *Construction Laborers Pension Trust*, 5 Empl. Ben. Cases (BNA) 1161, 1178 (Arb. Zimring Feb. 29, 1984); *Perkins Trucking Co.* and *Local 807 Pension Fund*, 4 Empl. Ben. Cases (BNA) 1489, 1492-93 (Arb. O'Loughlin Jan. 24, 1983).

[18] Nor is the commencement of arbitration a solution where, as here, an employer is contesting the very arbitrability of its dispute. *See Local 106*, 838 F.2d at 961 (submission to arbitration is a "*de facto* recognition of the arbitrator's authority"). And, as noted, *Barker & Williamson* equates submission to arbitration

the district court's decision to toll Banner's time for initiating arbitration was the only way for it to meaningfully fulfill its judicial responsibility to decide jurisdictional issues or, in its words, to determine that arbitration was "not only proper but *possible*." (Pet. App. D 42a, emphasis in original.)

Such a sensible ruling hardly extends an "invitation to abuse the judicial process." (Pet. 13.) As noted, courts have had no difficulty sifting serious jurisdictional challenges from dilatory maneuvers to litigate rather than arbitrate withdrawal liability claims.[19] The decisions below suggest nothing to the contrary. Rather, they expressly avert the "dire results Central States predicts" by cautioning that "not . . . every arguable issue of statutory interpretation will toll" the time to initiate arbitration. (Pet. App. D 41a.) Indeed, the court of appeals warned any "similarly-situated employer" against raising the jurisdictional issue that was resolved in favor of arbitration below. (Pet. App. C 21a.)

Petitioner's "Supplemental Brief" dramatizes the alarmist nature of its claims that the decision below threatens the policies of MPPAA. It is telling that, over two years after the district court's tolling decision, petitioner can point to only *one* case as its evidence that employers will be induced to litigate frivolous claims. Petitioner's reading of *Central Transport* is overstated in any event. Contrary to petitioner's statement that *Central Transport* "expansively interprets" the ruling below (Supp. Pet. 4), *Central Transport* described *Banner* as a "narrower situation which caused a limited attenuation" of earlier rulings that employers, based on the specific facts of those cases, had forfeited their right to arbitrate.[20] (Supp. Pet. App. 6a.)

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under MPPAA as "admitting" that the party is a member of a control group, which is precisely what Banner was contesting. 788 F.2d at 129.

[19] *See notes* 5 & 6, *supra*.

[20] The fact-specific nature of these decisions is illustrated by the fact that Judge Kanne, who authored *Central Transport*, sat on

In *Central Transport*, the panel held that an employer —who had reasonably relied on prior holdings that a bankruptcy proceeding *is* a *proper* forum for resolving certain disputes under MPPAA and who had timely raised its defenses in that alternative forum—had not waived its right to contest the assessment. This result hardly gives rise to new and frivolous means of thwarting MPPAA. Finally, the split in authority over whether a bankruptcy proceeding prevails over arbitration in MPPAA cases is an issue that is clearly not part of *this* case.[21]

## CONCLUSION

The petition for certiorari should be denied.

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the panel below and also authored *Robbins* v. *Admiral Merchants*, 846 F.2d at 1057, which found an "[employer's] contentions" in court a "mere smokescreen" and hence held that the employer had waived all its defenses.

[21] Indeed, the fund in *Central Transport* has obtained an extension of time to seek rehearing, while both the PBGC and Central States, the petitioner here, intend to support such a petition as *amici*. This further shows that any concern over tolling MPPAA's arbitration provisions should be directed to *that* case and should await the Seventh Circuit's resolution of that issue in the first instance.